



Office of the Ohio Public Defender

Elizabeth R. Miller, *State Public Defender*

Senate Bill 101 Proponent Testimony

Richard Cline, Assistant Public Defender

Senate Judiciary Committee

December 4, 2024

Chair Manning, Vice Chair Reynolds, Ranking Member Hicks-Hudson, and members of the Senate Judiciary Committee:

Thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender ("OPD") in support of Senate Bill 101 ("SB 101"). I am Richard Cline, an Assistant Public Defender for the OPD in the Death Penalty Department.

I submit this testimony as someone who has practiced criminal defense for 44 years, including the trial of six capital cases. I also served 20 years on City Council in Powell, Ohio, so I have some understanding of the legislative decision-making process. I mention my service on the Powell City Council because, like the members of this Committee, I tried to make evidence-based decisions about the merits of each piece of legislation that came before me. When one looks at the evidence objectively, one concludes that it is time to end Ohio's death penalty.

Death penalty proponents make three basic arguments to support it: they allege that the death penalty is necessary to deter homicides, that unnecessary appeals drive up the cost of death penalty cases, and the family members of victims need the death penalty to attain justice. The evidence does not support any of these arguments.

There is no evidence that the death penalty deters homicides.

Some proponents claim that the death penalty is a necessary deterrent; that it prevents homicides. If that premise were accurate – if the death penalty actually deterred homicides – then one would predict that the homicide rate in states without a death penalty would exceed the homicide rates in states with a death penalty. Instead, we find that states without a death penalty consistently have lower homicide rates.¹

Countless studies have attempted to validate or invalidate the claim that capital punishment laws deter homicides. The National Academy of Sciences received a National Institute of Justice Grant to review these studies, and the methodology employed in them. To do its work, the National Research Council reviewed published studies spanning a 35-year period (1976 - 2011). In 2012, the National Research Council published its review² of the methodology of scientific



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studies that sought to validate the claim that having a death penalty actually deters homicides. The conclusion was startling: “Having reviewed the research that the death penalty affects homicide rates, we conclude that it does not provide such evidence.”³ There is no scientific evidence to support the claim that the death penalty deters homicides.

The Death Penalty is prohibitively expensive because it is so often wrongly sought.

More than 40 years ago, the United States Supreme Court held that “death is different.”⁴ Death is different both because it is a severe punishment, and because it is final punishment. Due process of law requires that we provide special protections against the possibility of wrongful conviction in capital cases. As a defense attorney who tried a half-dozen capital cases, I can attest that these special circumstances are expensive. Some of those protections include:

- (1) Every indigent capital defendant is entitled to the appointment of two specially trained attorneys.⁵
- (2) Court appointed counsel in capital cases are paid at a higher rate than the court pays those same attorneys when it appoints them to a non-capital case.
- (3) Capital defendants are entitled to the appointment of experts, at state expense, including a mitigation specialist, a fact investigator, and a defense psychologist.⁶
- (4) Jury selection is much different in a capital case than it is in a non-capital case. The defense is entitled to additional peremptory challenges.⁷
- (5) Individual voir dire is common in a capital case.
- (6) Capital cases are the only cases where we ask potential jurors to explain their views on punishment. We then intentionally and systematically exclude any potential juror who expresses qualms about imposing the death penalty – a process that skews the jury in favor of conviction.⁸
- (7) Capital juries must be sequestered during deliberations.⁹
- (8) Capital cases are the only cases in which we require alternate jurors to continue to serve while the actual jury is deliberating.¹⁰
- (9) If the jury finds the defendant guilty of both aggravated murder and at least one aggravating circumstance, the case moves to a second trial regarding the issue of punishment.¹¹

We provide these special procedures and protections in capital cases because death is different. It is tragic when we wrongfully convict someone, and they spend time in prison for a crime they did not commit. In those cases, we can correct the error. Death is final. There is no way to correct that error.

After a court imposes a death sentence, the law requires us to provide specially trained attorneys to pursue direct appeal, postconviction relief, federal habeas relief, and clemency.



The right to appointed counsel in these post-verdict cases flows from the recognition that there is no cure for a wrongful execution. Ohio taxpayers pay approximately \$3 million dollars per death penalty case¹² compared to \$1 million dollars per life without parole case. Death Penalty proponents argue that the high cost of capital cases flows from too many special protections and that the way to save money is to restrict appeals and speed up the imposition of the death sentence. That argument ignores the fact that 40% of the people sentenced to death win relief due to some form of legal error. Opponents of the bill claim proponents do not have justice in mind when we support repealing the death penalty. Despite significant mistakes in the process 40% of the time, prosecutors keep pushing towards execution, which directly contradicts their demands for justice.¹³ If we restrict appeals, we do nothing to change the 40% error rate – we just increase the odds that Ohio executes a person the law says should not be executed or a person that is actually innocent.

The Death Penalty system is fatally flawed.

Any error rate in capital cases is unacceptable. The system for selecting and indicting capital cases relies on humans, and humans make mistakes. Those mistakes occur in every human endeavor, including in the criminal justice system. The error rate in our current system is unacceptably high. For every case indicted with death specifications, only 7% of the cases actually result in a death verdict. Of those cases that result in a death verdict, 40% are reversed for some kind of legal error, not necessarily innocence. After years of incarceration and lengthy appeals, 18% of the death cases do not result in the person being executed because they are granted clemency. Overall, of the individuals that receive a death verdict, only one in six death sentences are imposed.

Bill opponents argue that the death penalty is reserved for only the worst of the worst offenders – and that prosecutors do not indict cases with death specifications unless the offender is truly among the worst of the worst. Yet, 93% of the capitally indicted cases do not result in a death sentence. For every five people executed, one person has been exonerated. Five out of six people initially sentenced to death are never executed.

We cannot ignore the gross inequalities that infect our death penalty. Almost half of all Ohio executions come from the same three counties. The murder of a white victim is more likely to be solved than the murder of black victim, and killing a white victim is more likely to result in the death penalty than killing a black victim. Death penalty jurors are more likely to be white individuals, making it impossible for some Ohioans to have a jury of their peers. To quote former State Public Defender Tim Young, “Whether someone is sentenced to death has less to do with the crime they committed and more to do with the victim and the location of that crime.” That is not justice.

Capital Punishment Traumatizes Victims’ Families, Jurors, and Corrections Staff.



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Proponents of capital punishment argue that the families of victims need capital punishment to secure justice. That argument ignores all the trauma that flows from the continued use of a flawed system that cannot be fixed. Justice for the family of victims cannot occur when we sacrifice the procedures needed to ensure that the system only executes those offenders who the law says are subject to execution. Justice is not served when the race of the victim and the county where the crime occurred are the best predictors of whether a death sentence will be imposed. Justice is not served when the system convicts the wrong person or promises a death sentence that the law does not permit.

Conclusion.

The death penalty is a flawed system that traumatizes the victims' families, attorneys, jurors, and corrections officers who participate in it, has not been shown to deter homicides, is prohibitively expensive, and is fraught with errors. There is no equal justice in the death penalty. It is time to end the death penalty in Ohio. Thank you for the opportunity to testify in support of SB 101.

Endnotes:

¹ *Deterrence: Capital Punishment and Police Safety*; <https://deathpenaltyinfo.org/policy-issues/deterrence/capital-punishment-and-police-safety> (last accessed 12/02/2024).

² National Research Council. (2012). *Deterrence and the Death Penalty*. Committee on Deterrence and the Death Penalty, Daniel S. Nagin and John V. Pepper, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. *See also, Does Capital Punishment Deter Murder? A Brief Look at the Evidence*, John Lamperti, Professor of Mathematics, emeritus, Dartmouth College, Hanover, NH (March 2010), <https://math.dartmouth.edu/~lamperti/my%20DP%20paper,%20current%20edit.htm>, (last accessed 12/02/2024).

³ *Deterrence and the Death Penalty*, Note 2, at 103.

⁴ *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

⁵ Appt.Coun.R. 5.02.

⁶ Appt.Coun.R. 5.10(A). *See also*, Crim. R. 42(E), R.C. 2929.024.

⁷ Crim.R. 24(D).

⁸ *Death Qualification of Juries*, Forensic Psychology, <http://criminal-justice.iresearchnet.com/forensic-psychology/death-qualification-of-juries/> (last accessed 12/02/2024).

⁹ Crim.R. 24(I)(2)(c).

¹⁰ Crim.R. 24(G)(2).

¹¹ R.C. 2923.03(D).

¹² *See The Cost of Ohio's Death Penalty*, Ohioans to Stop Execution, March 14, 2014, <https://otse.org/deathpenalty-cost/> (last accessed 12/02/2024).

¹³ Report: 83% of Death Sentences Have Not Resulted in Executions Under Ohio's 'Lethargic' Death Penalty, Death Penalty Information Center, April 9, 2021.

